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FILED
JAN 2 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 708

SIDNEY S. GRANT, *Respondent,*

against

THE READER'S DIGEST ASSOCIATION, INC., *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, The Reader's Digest Association, Inc., respectfully prays that a writ of certiorari issue to review the Order of the United States Circuit Court of Appeals for the Second Circuit filed November 2, 1945 (R. 20), which Order reversed a judgment of the United States District Court for the Southern District of New York entered April

NOTE: All references to the record before the Court below, and to the record of the further proceedings in the Court below, are in page numbers.

20, 1945 (R. 13), dismissing a complaint in libel for insufficiency in law on its face.

The opinion of reversal of the Circuit Court of Appeals, not yet officially reported, is at R. 17. The opinion of the District Court is at R. 5.

Summary Statement of the Matters Involved

This case involves a claim of libel by the respondent, a Massachusetts citizen, against the petitioner, a New York corporation, predicated upon the publication in the September, 1944 issue of the petitioner's magazine, "The Reader's Digest", in an article entitled "I Object To My Union In Politics", of the following matter:

> "And another thing. In my state the Political Action Committee has hired as its legislative agent one Sidney S. Grant who but recently was a legislative representative for the Massachusetts Communist Party."

In his complaint, the respondent alleged as an extrinsic fact that he was an attorney (R. 2), and further pleaded, by way of innuendo, that the above quoted words falsely charged that the respondent, an attorney representing labor organizations, had represented the Communist Party of the State of Massachusetts in the official capacity of legislative agent before the General Court of Massachusetts (R. 3). No special damages were alleged in the complaint.

Following the service of the summons and complaint, the petitioner made a motion in the District Court to dismiss the complaint for legal insufficiency, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (R. 4). That motion was granted by the District Court upon the ground that the matter complained of was not libelous or actionable *per se* (R. 7). Although the District Court granted the respondent leave to amend his complaint to

allege special damages, if any (R. 7), no such amendment was made; and the judgment of dismissal was entered on the respondent's default in pleading (R. 13).

The Circuit Court of Appeals, in reversing the judgment of the District Court, considered that a jury might find that the alleged libelous words charged the respondent with having acted as an agent of the Communist Party and with being in general sympathy with its objects and methods, and held that such a charge was actionable *per se* under the law of the State of New York (R. 17).

Opinions Below

The District Court, in granting the petitioner's motion to dismiss, stated that "after a careful examination of the precedents furnished me by both plaintiff and defendant and after an extensive search in the books on my own account, I feel constrained to find that the words complained of are not libelous *per se*", citing the New York cases of *Garriga* v. *Richfield,* 174 Misc. 315; *Luotto* v. *Field,* 49 N. Y. S. (2d) 785, 788 (R. 6); but the Circuit Court of Appeals recognized neither of these two cases as controlling authority. Instead, the Circuit Court of Appeals, after stating (erroneously, as we believe) that the case at bar "turns upon whether it is libellous in New York to write of a lawyer that he has acted as agent of the Communist Party, and is a believer in its aims and methods" (R. 18), indulged for the greater part of its opinion of reversal in an exposition of what it considered to be the underlying philosophy of the law of libel in the State of New York.

Thus, the Circuit Court of Appeals first observed, without any citation of New York authority, that the "interest at stake in all defamation is concededly the reputation of the person assailed; and any moral obliquity of the opinions of those in whose minds the words might lessen that reputation, would normally be relevant only in mitigation of

damages" (R. 18). The Court then proceeded to find that, while the New York decisions "define libel, in accordance with the usual rubric, as consisting of utterances which arouse 'hatred, contempt, scorn, obloquy or shame', and the like", and "the opinions at times seem to make it a condition that to be actionable the words must be such as would so affect 'right-thinking' people" (R. 18-19), an actionable libel may result, regardless of the reaction of "right-thinking" persons, relying principally upon the New York case of *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17. The Court did not believe, therefore, that it "need say whether 'right-thinking' people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means" (R. 19). As the Court stated in its opinion of reversal: "It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did" (R. 19).

Only in the last paragraph of its opinion of reversal did the Circuit Court of Appeals make any reference to pertinent New York decisions cited and discussed in the parties' appeal briefs. After noting that, in *Garriga* v. *Richfield*, 174 Misc. 315 (relied upon by the District Court), Mr. Justice Pecora held "that it was not libellous to say that a man was a Communist", and that, in the next year in *Levy* v. *Gelber*, 175 Misc. 746, Mr. Justice Hofstadter "held otherwise", the Court observed that such apparent conflict of authority "perhaps left the answer open" (R. 20). However, the Court regarded the case of *Boudin* v. *Tishman*, 264 App. Div. 842, as "an unescapable ruling, although no opinion was written", and "Being the last decision of the state courts, it is conclusive upon us, unless there is a difference between saying that a man is a Communist and saying that he is an agent for the Party or sympathizes with its objects and methods" (R. 20). The Court then considered that any such difference was "one of degree only" (R. 20), and concluded its opinion of re-

versal with the observation that "those who would take it ill of a lawyer that he was a member of the Party, might no doubt take it less so if he were only what is called a 'fellow-traveler'; but, since the basis for the reproach ordinarily lies in some supposed threat to our institutions, those who fear that threat are not likely to believe that it is limited to party members. Indeed, it is not uncommon for them to feel less concern at avowed propaganda than at what they regard as the insidious spread of the dreaded doctrines by those who only dally and coquette with them, and have not the courage openly to proclaim themselves" (R. 20).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A. § 347(a)]. The order of the Circuit Court of Appeals, reversing the judgment of the District Court, was filed November 2, 1945 (R. 21); and the order of the Circuit Court, denying a petition for a rehearing, was filed November 21, 1945 (R. 26).

Questions Presented

The primary question presented by the case at bar is whether or not it is an actionable libel, under the decisional law of the State of New York, for a member of a labor union to write in an article entitled "I Object To My Union In Politics", published in September, 1944, in a magazine of general circulation throughout the United States of America, that a named person, also described as the legislative agent of the Political Action Committee, was formerly a "legislative representative for the Massachusetts Communist Party". This question, with the case in its present posture, necessarily calls for a determination, as a matter of law, whether the alleged libelous words, fairly and reasonably construed, are susceptible of a de-

famatory imputation and, if so, whether such imputation is actionable under the law of New York without allegation and proof of special damage.

If the primary question herein is determined in the petitioner's favor, a further question, posed by the counsel for the respondent in his brief in the Circuit Court of Appeals and left open by the Circuit Court of Appeals in its opinion of reversal, may arise, viz., whether the complaint herein is legally sufficient if the alleged libelous words are or may be regarded as actionable *per se* anywhere in the United States.

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of local law in a way to be deemed in conflict with applicable local decisions. It is settled law in New York that alleged libelous words, to be actionable *per se*, must appreciably affect reputation and, considered and weighed "in the minds of right-thinking persons", or "in the minds of ordinary, just and reasonable citizens", must be such as would tend to expose a person to public hatred, contempt and ridicule, or to induce an evil opinion of one in the minds of "right-thinking" persons and deprive him of their confidence and friendly intercourse in society. It is also the well-established rule in New York that an innuendo pleaded in a complaint cannot change or enlarge the plain meaning of words, and that it is not enough that the language complained of tends to injure the plaintiff in his office, profession or trade, but it must be proven to have been spoken or written in relation thereto. Furthermore, with proper regard for Constitutional guarantees of freedom of speech and of the press, the New York Courts have uniformly recognized the legal right of any person, whether newspaper, magazine, or private individual, to criticize and comment freely upon persons engaged in political activities

and other matters of public concern, at least where no attack is made upon their personal character in their private capacity. The Circuit Court of Appeals, as its opinion of reversal shows, failed to decide the instant case in accordance with these fundamental principles of the New York law of libel; and the decision below, if permitted to stand, would set an objectionable and confusing precedent wholly at variance with numerous decisions of New York Courts in cognate cases.

2. The Circuit Court of Appeals, in deciding an important question of local law, has failed to comply with the pronouncements of this Court relative to the ascertainment and application of state law in diversity cases. While purporting to follow the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, as amplified by subsequent decisions of this Court, the Circuit Court of Appeals in fact made no fair, adequate or accurate appraisal and analysis of the New York cases bearing on the primary question presented by the case at bar. The Court not only disregarded authoritative New York decisions in point, including the authorities relied upon by the District Court; it deliberately refused to recognize and apply the well-settled New York rule, hereinabove averted to, that an alleged libel on a man in the way of his business, trade or profession is not actionable *per se* unless proven to have been written in relation thereto; and the Court went out of its way to cite and discuss a number of New York cases having little or no relation to the question at hand. With all due deference, the Circuit Court of Appeals did not perform its proper function and duty of ascertaining and applying state law as defined and applied by the courts of appellate and original jurisdiction in the State of New York, but decided the instant question in the light of its own preconceived notions as to what the New York law of libel ought to be.

3. The decision below has the effect of circumscribing the rights of freedom of speech and freedom of the press

and unduly restricts free discussion of political matters of vital public concern. If the actionability of words, alleged to be defamatory, is to be tested by the reaction of "wrong-thinking" persons, Constitutional freedom of speech and freedom of the press become, for all practical purposes, uncertain and illusory guarantees. Moreover, if such a test is to be applied in respect of published matter of a controversial or political nature, it is obvious that the exercise of these fundamental rights and liberties is substantially abridged, for no self-respecting publisher, regardless of the size of his pocketbook, could regularly undertake to publish what, in his opinion, should properly be published in the public interest, at the risk of being hailed into Court to answer and justify not only the truth of his printed words, but any imputation which a Court or jury thinks "wrong-thinking" persons thought or may have thought on reading the alleged libel. To hold the matter complained of herein actionable without allegation and proof of special damage, is clearly to impair and diminish "the effective exercise of rights so necessary to the maintenance of democratic institutions" (*Thornhill* v. *Alabama*, 310 U. S. 88, 96).

4. A review by this Court of the Circuit Court of Appeals' order of reversal herein is especially desirable in view of the Circuit Court of Appeals' decision in *Sweeney* v. *Schenectady Union Publishing Company*, 122 F. (2d) 288, and this Court's decision *per curiam* in that case, affirming the Circuit Court of Appeals' decision by an equally-divided vote (316 U. S. 642; rehearing denied, 316 U. S. 710). In the *Sweeney* case, as this Court may recall, the plaintiff, an Ohio Congressman, brought a libel action against a New York newspaper publisher, claiming that an article in the defendant's newspaper falsely accused the plaintiff of opposing the appointment of one Freed to the Federal bench in Ohio because Freed was a Jew and of foreign birth. There, as here, the Circuit Court of Appeals, purporting to ascertain and apply the law of New York, reversed a District Court order granting the defendant's

motion to dismiss the complaint for legal insufficiency, and held that the alleged libelous article was susceptible of a charge of anti-Semitism and that such charge was actionable *per se*. In so holding, however, and contrary to its decision in the case at bar, the Circuit Court of Appeals recognized and applied the well-established New York rule above-adverted to, and refused to consider "any libel upon the plaintiff as a lawyer since no reference was made in the publication to that profession of his" (122 F. (2d) 288, 290). Likewise, the Circuit Court of Appeals recognized and purported to base its decision in the *Sweeney* case squarely upon the New York Court of Appeals' decision in *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, which decision the Circuit Court of Appeals refused to follow in the case at bar. As Circuit Judge Chase, writing for the majority in the *Sweeney* case, stated: "The test is whether right-thinking persons would be reasonably expected to be induced by the publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured in one or more of the respects above noted" (122 F. (2d), 288, 290). Only in respect of its refusal to give effect to the New York decisions recognizing the right of any citizen to criticize and comment freely upon political matters and other matters of public concern, was the opinion of the majority of the Circuit Court of Appeals in the *Sweeney* case consistent with the Court's opinion of reversal herein; and although this Court granted certiorari on the defendant publisher's application in the *Sweeney* case (314 U. S. 605), presumably because of the "special and important" reasons therefor, the tie vote in this Court unfortunately permitted the Circuit Court of Appeals' decision of reversal to stand. It is, therefore, a matter of considerable present importance, not only to your petitioner, but to all New York publishers of newspapers, magazines and other publications, that a writ of certiorari be allowed in this case in order that the "accident of diversity of

citizenship" shall not again "disturb equal administration of justice in co-ordinate state and federal courts sitting side by side" (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 489, 496).

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered on its Docket No. 19875, and entitled as above shown; and that the Order of that Court filed November 2, 1945, be reversed; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: New York, N.Y.
December 31, 1945.

ROBERT E. COULSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals, not yet officially reported, is at R. 17. The opinion of the District Court is at R. 5. As stated in the petition submitted herewith, the jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A. § 347(a)].

Specification of Error

The Circuit Court of Appeals erred in reversing the judgment of the District Court and in failing to affirm the same.

Statute and Constitutional Provisions Involved

The Rules of Decision Act (Judiciary Act of 1789, c. 20, § 34, 28 U. S. C., § 725) provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Constitution of the State of New York, Article I, Section 8, provides:

> "§ 8. [*Freedom of speech and press; criminal prosecutions for libel.*]
>
> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments

> for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

In addition, the First and Fourteenth Amendments to the Constitution of the United States are deemed pertinent.

ARGUMENT

I

The Circuit Court of Appeals has decided an important question of local law in a way to be deemed in conflict with applicable local decisions.

Under the decisional law of the State of New York, words claimed to be defamatory are to be given a fair reading; they are to be construed as persons generally understand them and according to their ordinary meaning; and where the words are plain and unambiguous on their face, the question of libel or no libel presents a question of law for Court determination (See *Moore* v. *Francis, et al.*, 121 N. Y. 199, 202-203; *Morrison* v. *Smith*, 177 N. Y. 366, 368-369; *Cafferty* v. *Southern Tier Publishing Co.*, 226 N. Y. 87, 93; *Hays* v. *American Defense Society*, 252 N. Y. 266, 270; *Balabanoff* v. *Hearst Consolidated Publications*, 294 N. Y. 351, 356).

The Court below, in construing the matter complained of herein, did not follow these general rules of construction. The Court read into the alleged libel things which were not there; and the construction which the Court held a jury might place on the alleged libelous words is obviously strained and presses the words out of their ordinary sense and meaning.

Indeed, not even the plaintiff in his complaint claimed that the words accused him of being a member of the Communist Party or in general sympathy with its objects and methods. The sole innuendo pleaded in the complaint was that the words in question charged that "plaintiff, an attorney representing labor organizations, had represented the Communist Party of the State of Massachusetts in the official capacity of legislative agent before the General Court of Massachusetts" (R. 3). The fact that the plaintiff, in an effort to spell out a defamatory meaning, found it necessary to plead such an innuendo and to allege as an extrinsic fact that he was an attorney, was sufficient reason in itself for holding that the words complained of were not actionable without allegation and proof of special damage.

As stated by the New York Appellate Division, First Judicial Department, in *Keene* v. *Tribune Association,* 76 Hun. (N. Y.) 488, at 490:

> " * * * There is no question that 'whatever words have a tendency to hurt, or bring ridicule and contempt on the plaintiff, or are calculated to prejudice a man who seeks his livelihood by any trade or business are actionable. When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and the resulting damage are presumed.' (*Moore* v. *Francis,* 121 N. Y. 204.) But the difficulty with the plaintiff's case is that there is nothing in the article which shows that any part of the publication was made in respect to any trade or business in which the plaintiff was engaged. Where such is the case an innuendo cannot change or enlarge the plain meaning of words, and it is not enough that the language tends to injure the person in his office, profession or trade, but it must be proven to have been spoken in relation thereto. (*Moore* v. *Francis, supra.*) As was said in *Kinney* v. *Nash* (3 N. Y. 177), it must touch him in his office, profession or trade."

See also, in this connection, *O'Connell* v. *Press Publishing Co.*, 214 N. Y. 352; *Groggins* v. *Daily Mirror, Inc.*, 268 N. Y. 529; *Kuhn* v. *Veloz*, 252 App. Div. 515; *Weidberg* v. *LaGuardia*, 170 Misc. 374; and *Pottish* v. *Long Island Daily Press Pub. Co., Inc.*, unofficially reported in 103 N. Y. Law Journal (February 21, 1940) at page 823.

In addition to its failure to give effect to the well-established New York rule enunciated by the *Keene* case, *supra*, the Court below also went counter to New York precedents in holding that the actionability of alleged libelous words does not necessarily depend upon the reaction of "right-thinking" persons. While it may be accepted as true that in New York, as elsewhere, the "interest at stake in all defamation is concededly the reputation of the person assailed" (R. 18), no New York case has ever held or suggested, as did the Court below, that "any moral obliquity in the opinions of those in whose minds the words might lessen that reputation, would normally be relevant in mitigation of damages" (R. 18), or that words may be actionable *per se*, regardless of the reaction of "right-thinking" persons, if there be some "wrong-thinking" persons who would regard the plaintiff with scorn, aversion or hostility by reason of the defendant's publication.

In the first place, substantial compensatory damages "must be founded upon a finding of substantial injury" (*Abell* v. *Cornwall Industrial Corporation*, 241 N. Y. 327, 335); and the only matter relevant on the question of mitigation of damages in a libel action in New York is the defendant's good faith in publishing the alleged libel (See *Fleckenstein* v. *Friedman*, 266 N. Y. 19).

Secondly, it has never been and is not now the law of New York that liability for libel is or may be dependent upon how "wrong-thinking" persons think or may feel. The fundamental principles of the New York law of libel, and the test to be applied in determining whether written or printed words are actionable *per se*, were succinctly stated by the New York Court of Appeals, per Crouch, J.,

in *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, as follows (262 N. Y. at page 102):

> "The law of defamation is concerned only with injuries to one's reputation. Except to the limited extent provided by statute (Civil Rights Law [Cons. Laws, ch. 6], §50), there is no right of privacy. (*Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538) Written words, the effect of which is to invade privacy and to bring undesired notoriety, are without remedy, unless they also appreciably affect reputation. This is the domain, not of positive law, but of obedience to the unenforceable. ("Law and Manners" by Lord Moulton, Vol. 134 The Atlantic Monthly [July, 1924], 1.) From such harms one is protected only by the code of common decency.
>
> "Reputation is said in a general way to be injured by words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society. (*Sydney* v. *Macfadden Newspaper Pub. Corp.*, 242 N. Y. 208.)
>
> "We shall assume, although it is not alleged, that wide-spread notoriety came to the plaintiff from the publication in question and that she suffered greatly as a result. But there must be something more than that to make it libelous. Considered and weighed 'in the minds of right-thinking persons' (*Sydney* v. *Macfadden Newspaper Pub. Corp., supra*), or as elsewhere expressed, 'in the minds of ordinary, just and reasonable citizens' (*Mycroft* v. *Sleight*, [1921] 90 L. J. K. B. 883, 37 Times Law Rep. 646, 648), do the words published by defendant tend to expose plaintiff to any of the evil results catalogued in the general statement above? * * *"

The foregoing principles, which were held to be basic New York law by the Court below in *Sweeny* v. *Schenectady Union Publishing Company*, 122 Fed. (2d) 288, 290, have been reiterated by the New York Courts time and again;

and these principles were not in any way overruled or qualified by the later decision of the New York Court of Appeals in the case of *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17, as the Court below assumed in its opinion of reversal herein. The majority opinion of the then Judge Loughran in the *Katapodis* case not only recognized the *Kimmerle* case as authoritative; but the decision in the *Katapodis* case, holding actionable *per se* a newspaper article which wrote up the plaintiff parents of a deceased child as objects of pity and in such a way as might tend to "deprive them of friendly association with a considerable number of respectable members of their community" (287 N. Y. 17, 21), is plainly consistent with the prior decision of the New York Court of Appeals in the *Kimmerle* case, and has been so regarded by subsequent New York cases (See *Balabanoff* v. *Hearst Consolidated Publications*, 294 N. Y. 351, 356; *Neaton* v. *Lewis Apparel Stores*, 267 App. Div. 728, 733; *Lubliner* v. *Reinlib*, 184 Misc. 472, 484; *Thomas* v. *Hunt*, unofficially reported in 110 N. Y. Law Journal (November 10, 1945) at page 1265).

Finally, the decision of the Court below, as in the case of the majority decision of the Court below in *Sweeney* v. *Schenectady Union Publishing Company, supra*, is in direct conflict with pertinent New York decisions recognizing the legal right of all citizens, including newspapers and magazine publishers, to criticize and comment freely upon political matters and other matters of public concern (See *Hamilton* v. *Eno*, 81 N. Y. 116; *Hoeppner* v. *Dunkirk Printing Co.*, 254 N. Y. 95; *Gardner* v. *Home Life Publications Co.*, 237 App. Div. 200; *Duffy* v. *New York Evening Post Co.*, 109 App. Div. 471; *Tanzer* v. *Crowley Publishing Corp.*, 240 App. Div. 203; *Hall* v. *Binghamton Press Co.*, 263 App. Div. 403; *Luotto* v. *Field*, 49 N. Y. Supp. (2d) 785, modified and affirmed 268 App. Div. 227, reversed on procedural ground and order of the Special Term affirmed 294 N. Y. 460; *Garriga* v. *Richfield*, 174 Misc. 315).

The case of *Boudin* v. *Tishman*, 264 App. Div. 842, which the Court below regarded as a conclusive and an

"unescapable ruling" in its opinion of reversal herein (R. 20), is clearly distinguishable from the case at bar. In that case, the alleged libel consisted of a letter written by the defendant to a third person in October, 1941, asserting that the plaintiff was an "admitted communist". The letter did not say that the plaintiff was a member of, or had acted on behalf of, a Communist Party having legal status in a particular State of the Union. Moreover, the alleged libelous letter in *Boudin* v. *Tishman, supra,* expressly referred to the plaintiff as "an attorney for the fur industry" and the plain import of the letter was that the plaintiff was not only an "admitted communist", but was a member of a communist organization engaged in subversive activities against the United States of America. No discussion or citation of authority is required to show that such a letter, which was tantamount to a charge of treason, or at the very least, sedition, is actionable *per se;* and it is not surprising, therefore, to find that the New York Appellate Division, First Judicial Department, in affirming the lower Court's order sustaining the legal sufficiency of the complaint, did so without opinion.

Likewise, the case of *Levy* v. *Gelber,* 175 Misc. 746, also referred to in the opinion of the Court below (R. 20), is not in point. There, the alleged libel was in the form of an open letter sent to members of a labor union; the letter, in addition to charging that the plaintiff attorney was a Nazi and a Communist, also charged that he had exacted undue and excessive fees; that he had split these fees with a layman, and that he had been disloyal to the best interests of his client. It is also to be noted that the decision in *Levy* v. *Gelber, supra,* was handed down in January, 1941, while the Hitler-Stalin Peace Pact was still in existence, and that Mr. Justice Hofstadter expressly stated in his opinion denying the defendant's motion to dismiss the complaint, that: "The *current* effect of these statements is the decisive test" (175 Misc. 746, 747). Manifestly, if such a test is to be applied, it is anomalous, to say the least, particularly in view of our present relations with Soviet Russia and the

professions of the Atlantic Charter, Dumbarton Oaks, the San Francisco Conference, and the Potsdam Declaration, for any Court in this country to hold that a reference to a person as "a legislative representative for the Massachusetts Communist Party" in the course of a magazine article on American politics published in the summer of 1944, during a political campaign of first importance, constitutes an actionable libel.

The answer to the primary question presented by the case at bar, it is submitted, is plainly suggested by Mr. Justice Pecora's opinion in *Garriga* v. *Richfield*, 174 Misc. 315, holding that it is not an actionable libel in New York to publish of a person that he is affiliated with or a member of the Communist Party. After referring to the political structure of the Communist Party, Mr. Justice Pecora said (174 Misc. 315, 320-321):

> "The fact remains, however, that the Communist party under existing law, may function as a political party. It may place upon our ballots its candidates for public office—even for the highest in the land—and seek popular support for them. It may, like any other established political party, proclaim its principles and invite public approval of them. At least while it possesses that status and those rights, it cannot be held that it is defamatory *per se* to say of one that he is affiliated with, or a member of, the Communist party, any more than it would be to say that he is a member of any other legally recognized political party. Any rule to the contrary would abridge that freedom of discussion relative to parties, principles and personalities in the political arena, which is so vital to the preservation of our democracy. To deprive our citizens of the right freely to debate political issues, or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better it is to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties. That right would be restricted at the expense of good

government if, for instance, in a community where a political party had fallen into disrepute on account of evil practices, one could be held generally liable in damages to another for saying of him that he is affiliated with, or a member of, that party.

"A further necessity for this rule is, that in many sections of the country—as is well known—a political party may be held in low esteem, because of prejudice, tradition or other equally unworthy reason, so that membership therein may expose one to contempt, hatred or ridicule; whereas in other sections the same political party may enjoy public favor and confidence. Should we, in the former situation, subject a person to liability for general damages for referring to another as a member of the despised party? The question itself echoes a negative answer."

To the same effect is the opinion of Mr. Justice Hooley, sitting at a Special Term of the Supreme Court of the State of New York, New York County, in *Luotto* v. *Field*, 49 N. Y. Supp. (2d) 785, modified and affirmed, 268 App. Div. 227, order of Appellate Division reversed on procedural ground and order of Special Term affirmed, 294 N. Y. 460. Although the New York Court of Appeals' decision of reversal dealt solely with a question of procedure, and the Court of Appeals expressed no opinion on the merits, both Mr. Justice Hooley, sitting at Special Term, and the New York Appellate Division, Second Judicial Department, expressly held on the merits that a statement in a newspaper article to the effect that the plaintiff was a "pre-Pearl Harbor Fascist", was not actionable *per se*. In so holding, Mr. Justice Hooley said (49 N. Y. Supp. (2d) 785, 788):

"* * * Prior to the entry of the United States into World War II it was not libelous per se to describe a man as a fascist. Up to that time it cannot be said that a man who held the political beliefs of fascism was a person who by reason thereof was exposed to public contempt, ridicule, hatred or dis-

> grace. True he would be out of step with our theory of government and the viewpoint of almost the entire population. It must be remembered that in our own country under our laws it was lawful for a person to run for the office of Governor of the State of New York upon the Communist Party ticket and platform. Americans are inveterate readers of newspapers. They are familiar with European politics. In their own minds they form opinions and carry on discussions as to which party in any country is the better. No rule of law should be established that would bar free discussion concerning politics, whether national or European, or would prevent free discussion concerning parties and ideologies, and that right would be circumscribed if reference to the affiliations of others were adjudged to be libelous per se. * * *"

and the New York Appellate Division, Second Judicial Department, in its *per curiam* opinion of modification and affirmance, said (268 App. Div. 227, 228-229):

> "The court correctly held that the publication of which plaintiff complains was not a libel *per se* insofar as it declared that plaintiff was a 'pre-Pearl Harbor Fascist,' which was all that the publication charged when fairly read. It is our view that the publication does not charge the plaintiff with anything that reflects upon his business skill or credit in his capacity as a manager of a radio station. The publication merely related to plaintiff's political views. The complaint does not allege that at the time of the publication plaintiff was engaged in such a calling or that he was such a manager. It alleges that he was an 'advertising agent' specializing in radio advertising. It is, therefore, insufficient to sustain causes of action for general damages. (*Frederics* v. *Nessler*, 187 App. Div. 590; *Cassavoy* v. *Pattison*, 93 App. Div. 370, 372; *Cafferty* v. *Southern Tier Publishing Co.*, 226 N. Y. 87; *Bank* v. *Goodwin*, 167 Mo. App. 211, 218; *Armstrong* v. *Sun Printing & Publishing Association*, 137 App. Div. 828, 831; *Purdy* v. *The Rochester Printing Co.*, 96 N. Y. 372.) The allegations that he had contract arrangements to become a manager in the event that the transfer

of the radio station was approved are insufficient as a basis for general damages. (33 Am. Jur., Libel & Slander, pp. 81-82, § 63; *Dudley* v. *Briggs,* 141 Mass. 582.)"

Reference may also be made, in this connection, to the opinion of the New York Appellate Division, First Judicial Department, in the case of *Duffy* v. *New York Evening Post Co.,* 109 App. Div. 471, where a newspaper article criticizing a Republican political candidate as—"Absolutely devoid of any knowledge of the customs of polite men. Does well in business, especially during Tammany regimes. Devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party. Is reported to be about to join Tammany openly soon. Apparently knows no more of and cares no more for political principles than he does of the silurian age in geology. Mixes in Tammany factional fights, to the detriment of the Republican Party. A most unworthy choice."—was held non-actionable in the absence of allegation and proof of special damage.

II

The Circuit Court of Appeals has failed to comply with the pronouncements of this Court relative to the ascertainment and application of state law in diversity cases.

That the Circuit Court of Appeals has failed to comply with the pronouncements of this Court in *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, as amplified by the subsequent decisions of this Court in *Wichita Royalty Co.* v. *City Bank,* 306 U. S. 103; *Fidelity Trust Co.* v. *Field,* 311 U. S. 169; *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, will be apparent not only from what has been said under the first point of this brief (pages 12-18, *ante*) but from the majority opinion of the Circuit Court of Appeals in *Sweeney* v. *Schenectady Publishing Company,* 122 Fed.

(2d) 288, as well as the dissenting opinion of Circuit Judge Clark in that case.

As pointed out in the petition submitted herewith (at pages 8-10), the majority of the Circuit Court of Appeals in the *Sweeney* case at least recognized and applied the well-established New York rule enunciated by the New York Appellate Division, First Judicial Department, in *Keene* v. *Tribune Association*, 76 Hun (N. Y.) 488, 490, and also recognized and purported to apply the fundamental principles of the New York law of libel as laid down by the New York Court of Appeals in *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, 102. In the case at bar, the Circuit Court of Appeals deliberately refused to follow its own majority decision in the *Sweeney* case in respect of these two important aspects of the New York law of libel. And, of course, both in this case and in the *Sweeney* case, the Circuit Court of Appeals failed to recognize and apply pertinent New York decisions sustaining the right of any citizen to criticize and comment freely upon political matters and other matters of public concern (See cases cited at page 16, *ante*).

It is not too much to say that the Circuit Court of Appeals in the present case made no fair, accurate, or adequate appraisal or analysis of the New York decisions bearing directly on the question presented. In the face of overwhelming New York authority sustaining the right of free discussion of political matters, and particularly in the face of the decision of Mr. Justice Pecora in *Garriga* v. *Richfield*, 174 Misc. 315, a case almost on all fours with the case at bar, the Circuit Court of Appeals deliberately went out of its way to cite and discuss New York libel cases involving imputations of abject poverty, illegitimacy and insanity, and finally wound up its opinion of reversal by relying upon the wholly inconclusive decision of the New York Appellate Division, First Judicial Department, in

Boudin v. *Tishman*, 264 App. Div. 842, which Court merely affirmed without opinion a lower Court's decision denying a motion to dismiss the complaint in a libel action for legal insufficiency where the alleged libelous statements went far beyond the matter claimed to be defamatory herein.

In this latter connection, it is no answer to say that, because the lower Court in *Boudin* v. *Tishman* denied the defendant's motion to dismiss the complaint, citing *Levy* v. *Gelber*, 175 Misc. 746, the affirmance of the lower Court's order without opinion by the Appellate Division in the *Boudin* case was tantamount to an adoption by the Appellate Division of the lower Court's reasoning, or an approval by the Appellate Division of the opinion of the lower Court in *Levy* v. *Gelber*. Apart from the fact that the alleged libels, both in the *Levy* case and in the *Boudin* case, went far beyond anything said in the defendant's article here in question, it is well settled in New York, and the Circuit Court of Appeals should have known, that: "Affirmance without opinion of prior orders made on motions addressed to the pleadings herein was not a ruling that this court adopted the reasoning or the language of the Special Term, but only its conclusion that the case was not to be disposed of on the pleadings but must await trial" (See *Dall* v. *Time, Incorporated*, 252 App. Div. 636, 641; and cases cited).

The case of *Boudin* v. *Tishman* was not, therefore, "an unescapable ruling, although no opinion was written", as the Circuit Court of Appeals stated in its opinion of reversal (R. 20). Neither was it "the last decision of the state courts" or "conclusive" upon the Circuit Court of Appeals in the present case. The decision in *Luotto* v. *Field, supra*, by the New York Appellate Division, Second Judicial Department (a Court of coordinate jurisdiction with the Appellate Division which affirmed without opinion the lower Court's order in *Boudin* v. *Tishman*) was the

latest decision of the New York Courts bearing directly upon the primary question presented by the case at bar; and it is submitted that the Circuit Court of Appeals, in any proper compliance with the rule of *Erie R. R. Co.* v. *Tompkins,* should have followed that decision and affirmed the judgment of the District Court herein.

III

The decision below has the effect of circumscribing the rights of freedom of speech and freedom of the press and unduly restricts free discussion of political matters of vital public concern.

The Constitution of the State of New York, no less than the Constitution of the United States, guarantees freedom of speech and freedom of the press subject to responsibility for the abuse of those rights (see Article 1, Section 8, Constitution of the State of New York, quoted at page 11, *ante*); and while a determination as to the actionability of alleged libelous words ordinarily presents no Constitutional problem, the decision of the Court below, both in its direct holding and in its implications, plainly has the effect of circumscribing the fundamental rights of freedom of speech and freedom of the press and unduly restricts free discussion of political matters of vital public concern.

For all practical purposes, the Constitutional guarantees of freedom of speech and freedom of the press stop where the law of libel and slander begins. If the Court below is correct in its holding that spoken or written words may be actionable by reason of the attitude of "wrong-thinking" persons, and more particularly, that it may be an actionable libel to refer to a man as "a legislative representative for the Massachusetts Communist Party", this Court as the final arbiter of the scope of these Constitutional guarantees should so decide.

The decision of the Court below, in this aspect, is wholly at variance with the New York law. As has previously been shown (at pages 14-16, *ante*), words alleged to be defamatory are actionable *per se* in New York if, and only if, they appreciably affect reputation and, considered and weighed "in the minds of right-thinking persons", or "in the minds of ordinary, just and reasonable citizens", are such as would tend to expose the plaintiff to public hate, contempt and ridicule. Otherwise, the plaintiff in a libel action in New York is not entitled to claim a presumption of general damages. If the alleged defamatory words are false and he was, in fact, harmed by reason of the attitude of "wrong-thinking" persons, he has his legal remedy by alleging and proving the special damages which he has suffered, an opportunity which was accorded to the plaintiff in the case at bar, and refused (R. 7, 12).

It is upon the foregoing basis, entirely consistent with accepted notions of the scope of the Constitutional guarantees of freedom of speech and freedom of the press, that the law of libel and slander has regularly been administered by the New York Courts; and where alleged defamatory words have related to political matters or other matters of public concern, the New York Courts, again with proper regard for the Constitutional guarantees of freedom of speech and freedom of the press, have uniformly recognized the legal right of any citizen to criticise and comment freely upon political matters and other matters of public concern (See cases cited at page 16, *ante*).

It was upon this basis that the District Court granted the defendant's motion to dismiss in the instant case (R. 6); and it is upon the same basis, we submit, that the case should have been decided in the Court below.

CONCLUSION

In conclusion, therefore, it is respectfully submitted that the petition of The Reader's Digest Association, Inc., for a writ of certiorari herein should, in all respects, be granted.

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Of Counsel.

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FILED
JAN 18 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 708

SIDNEY S. GRANT,
Respondent,

against

THE READER'S DIGEST ASSOCIATION, INC.,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

OSMOND K. FRAENKEL,
Attorney for Respondent.

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Respondent respectfully urges this Court to deny the application for a writ of certiorari. There is no merit to petitioner's contention that the Circuit Court of Appeals for the Second Circuit decided an important question of local law in conflict with applicable local decisions, nor is there any merit to the contention that the decision below would circumscribe freedom of the press.

So far as this latter contention is concerned, it should be pointed out that no such contention was made by petitioner in either of the courts below. Moreover, it has long been recognized that the law of libel constitutes an exception to that freedom granted to the press by the Constitution. There may, of course, be situations in which a claim under the libel laws would, if sustained, constitute a serious interference with liberty of the press. Such a situation

was indeed presented to this Court in the *Sweeney* case where this Court affirmed by an equally divided vote (316 U. S. 642). No such question is, we submit, presented in the case at bar. The essential difference, of course, is that Sweeney was a member of Congress. It is in the public interest that the widest possible comment be permitted with regard to the conduct of members of Congress. For the same reason free comment has been permitted by the New York courts with regard to the conduct of candidates for public office. See, for instance, *Duffy* v. *New York Evening Post*, 109 App. Div. 471. Cf. *Hall* v. *Binghamton Press Co.*, 263 App. Div. 403.

In the case at bar plaintiff is an ordinary citizen, neither a candidate for, nor a holder of public office. There is no reason why the ordinary rules of libel should not be applied here. No public interest is involved, no basis for any claim of interference with freedom of the press.

There is also no basis for the aspersions cast by petitioner upon the opinion of Judge Learned Hand. We see no occasion for dealing with that opinion in detail. It is obvious, however, that it rests primarily upon the cases of *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17, and *Balabanoff* v. *Hearst Consolidated Publications*, 294 N. Y. 351. In both of those cases the New York Court of Appeals reached the same conclusion as was reached here by the Circuit Court of Appeals, namely, that where there is any doubt about the meaning or application of words charged to be libelous that doubt must be resolved at a trial by a jury and cannot be disposed of on motion by a judge. That in essence is the decision here. It is in strict conformity with New York law. It should not be disturbed.

The suggestion in the petition (p. 9) that the Circuit Court of Appeals applied one rule in the *Sweeney* case (122 Fed. 288) and a different rule in the case at bar, ignores the fact that the *Katapodis* decision of the New York Court of Appeals had not yet been rendered at the time of the decision in the *Sweeney* case by the Circuit Court of Appeals. Moreover, in the *Sweeney* case the Cir-

cuit Court of Appeals denied the motion to dismiss on the basis of the *Kimmerle* case (262 N. Y. 99) and there was no need for going any further.

We submit, finally, that Judge Hand was correct in his belief that the New York Court of Appeals had expanded the law of libel in the *Katapodis* case. Certainly there is nothing in the opinion in that case to justify petitioner's statement in its brief (p. 16) that the *Kimmerle* case was recognized as authoritative in the *Katapodis* case, for Judge Laughlin merely cited the *Kimmerle* case in passing. It is significant also that counsel for both appellant and respondent in the *Katapodis* case relied on the *Kimmerle* case. The fact of the matter is that the decision in the *Katapodis* case does go a step beyond that reached in the earlier case. It is not, therefore, plainly consistent with that earlier case. It is wholly incorrect to say, as petitioner does (p. 16), that it has been so regarded by subsequent New York cases. Four cases are cited. The significant fact, however, is that in each of these cases the motion to dismiss the complaint was denied on the ground that it was for the jury to say whether the article complained of was libelous. Thus there was no occasion for the court in any of these cases to contrast the *Kimmerle* and the *Katapodis* cases. It is significant, moreover, that in two of these cases, *Neaton* v. *Lewis Apparel Stores*, 267 App. Div. 728, and *Lubliner* v. *Reinlib*, 184 Misc. 472, the *Kimmerle* case was not even mentioned. While it was mentioned in the other two cases it was not in any way contrasted with the *Katapodis* case.

Petitioner relies (p. 19) on the decisions in *Luotto* v. *Field*, 49 N. Y. Supp. (2nd) 785, and 268 App. Div. 227. It is true that there is some language in those decisions which might give petitioner comfort. However, the actual decision rendered at Special Term resulted in a denial of the motion to dismiss. It was this denial, and not any of the language used in either opinion, which was affirmed by the Court of Appeals. In any case, the nature of the statement complained of in that case is quite different from the nature of the statement complained of in the case at bar.

Finally, it should be noted that the Circuit Court of Appeals was fully justified in relying upon the decisions of the Appellate Division in the First Department, *Boudin* v. *Tishman*, 264 App. Div. 842 and *Hryhorijiv* v. *Winchell*, 180 Misc. 574, aff'd 267 App. Div. 817, if it believed that those decisions more truly reflected the views of the New York Court of Appeals than did this single decision in the Second Department.

It is, therefore, respectfully submitted that the application for a writ of certiorari should be denied, and the defendant required to answer and the case allowed to proceed to trial.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Respondent.